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No. 709

In the Supreme Court of the United States

OCTOBER TERM, 1961

B. NATHANIEL RICHTER AND ELWOOD S. [illegible],
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 190 F. Supp. 159. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 13-16) is not as yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1961 (Pet. App. 17). The petition for a writ of certiorari was filed on February 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly dismissed petitioners' claim for attorneys' fees on the ground that it was not within the jurisdiction conferred by the Tucker Act.

2. Whether the amount paid to the United States in satisfaction of its lien under Section 12(o) of the Railroad Unemployment Insurance Act is subject to a charge for attorneys' fees.

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2), provides in pertinent part as follows:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> * * * * * *

Section 12(o) of the Railroad Unemployment Insurance Act, 45 U.S.C. 362(o), provides as follows:

> (o) Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or

other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement.

STATEMENT

Petitioners, members of a law firm in Philadelphia, were retained on a contingent fee basis by a Pennsylvania Railroad employee to prosecute a claim against the railroad under the Federal Employers' Liability Act for injuries sustained by him in the course of his employment. In March 1960, petitioners obtained by settlement a gross recovery of $16,800. The railroad, in satisfaction of a lien of the Railroad Retirement Board, established pursuant to Section 12(o) of the Railroad Unemployment Insurance Act (RUIA), *supra*, paid the United States $2,210, representing the amount of benefits previously paid by the United States to the employee on account of disability arising from the accident. The remainder of the agreed settlement (*i.e.*, $14,590) was paid to petitioners and the employee. In accordance with their contingent fee arrangement, petitioners retained $4,639.41 of this amount, representing one third of the

net recovery after litigation expenses and the lien of the Board had been deducted.

Thereafter, petitioners brought this suit. The complaint asserted that the lien payment to the United States was made possible by their efforts and legal services; and that they were entitled to payment for the reasonable value of such services, i.e., $736.67 (one-third of the amount of the lien recovery). Judgment against the United States in that sum, together with interest, was demanded. Jurisdiction was claimed under the Tucker Act, 28 U.S.C. 1346(a)(2).

The United States moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. The basis of the motion was (1) that the complaint, on its face, showed that petitioners' claim was not founded upon an act of Congress or a contract implied in fact and, therefore, was not cognizable under the Tucker Act, and (2) that the RUIA does not permit assessment of attorneys' fees against the amount received by the Board in satisfaction of its Section 12(c) lien. The district court accepted the government's jurisdictional contention, granted the motion and entered judgment dismissing the complaint. The court of appeals affirmed (Pet. App. 13-16).

ARGUMENT

The courts below held that petitioners' claim was based on Pennsylvania law or general equitable principles and was therefore not cognizable under the Tucker Act as one founded upon an act of Congress

or an implied contract with the United States. In addition, they determined that there was no statutory warrant for imposing attorneys' fees upon the amount of money paid to the United States as reimbursement for sickness benefits paid under the Act. We submit that these holdings are clearly correct and do not conflict with decisions of other courts. Hence, there is no basis for review by this Court.

1. The Tucker Act gives the district court jurisdiction over claims "founded either upon * * * any Act of Congress * * * or upon any express or implied contract with the United States." Judged upon its face, as it must be (*Gully* v. *First National Bank*, 299 U.S. 109, 113), petitioners' complaint (attached as an Appendix, *infra*, pp. 13–15) falls within neither head of statutory jurisdiction.

The complaint makes no reference whatsoever to the Railroad Unemployment Insurance Act, the "Act of Congress" upon which petitioners now assert their claim is founded. Nor does it allege facts from which the district court could have found a contract with the United States, either express or implied in fact.[1] Insofar as is pertinent here, the complaint alleges only (Appendix, *infra*, p. 15):

> 10. In paying over the sum of $2,210.00 to the UNITED STATES through the BOARD, said RAILROAD, in error, failed to deduct the sum of $736.67 from the amount so remitted to the UNITED

[1] The courts have uniformly construed the Tucker Act to provide that the implied contract must be one implied in fact as opposed to one implied in law. *Goodyear Tire & Rubber Co.* v. *United States*, 276 U.S. 287.

> STATES. This latter sum of $736.67 should have been paid over by RAILROAD to the plaintiffs rather than to the BOARD since it represents moneys due the plaintiffs out of the fund of $2,210.00 in consideration of the services rendered by the plaintiffs to the Railroad Retirement Board and the UNITED STATES in creating such fund by securing for the Railroad Retirement Board and the UNITED STATES said sum of $2,210.00.

When the government moved to dismiss the complaint for lack of jurisdiction of the subject matter, petitioners did not argue that their claim rested upon the RUIA or amend the complaint to lay a foundation for this contention. The district court therefore properly granted the government's motion, holding (190 F. Supp. at 161):

> * * * Since there is no statutory authority, their recovery must be based on a quantum meruit basis or on principles of implied contract or of quasi-contract, or on the equitable principle of having created the fund.
>
> It is quite clear from reading the complaint that if the plaintiffs have any claim against the United States, it is on the basis of a contract implied in law as opposed to a contract implied in fact, or on the equitable principle of having created the fund. The United States has not consented to be sued in this action and the federal jurisdiction recognizes no such equitable right. Therefore the District Court has no jurisdiction over this action.

In the court of appeals petitioners attempted to remedy the jurisdictional flaw created by their com-

plaint by arguing that the district court misunderstood the theory of their case. They urged there (Pet. App. 14), just as they assert in the petition that the action falls within the jurisdiction given by the Tucker Act over claims founded upon an act of Congress since the suit is for recovery of funds paid to the Railroad Retirement Board "by reason of a misinterpretation of the provisions of the Railroad Unemployment Insurance Act * * *" (Pet. 2; Appellants' Brief, p. 1; see also Pet. 4, 5, 6, 8-9). This contention necessarily requires the Court to go beyond the face of the complaint and should be rejected under *Gully* v. *First National Bank*, *supra* at 113.

Even in argument, however, petitioners have failed to show that their claim is founded upon the RUIA. The decisive consideration in determining whether a claim is founded upon an act of Congress is the federal nature of the right to be established. *Puerto Rico* v. *Russell & Co.*, 288 U.S. 476; *Gully* v. *First National Bank*, *supra*. The claim against the United States must be founded upon a provision of a federal law which "conditions and determines its validity." *Christie Street Commission Co.* v. *United States*, 136 Fed. 326, 331 (C.A. 8); *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28; *Dismuke* v. *United States*, 297 U.S. 167; *United States* v. *Ohio Oil Co.*, 163 F. 2d 633, 639 (C.A. 10), *certiorari denied*, 333 U.S. 833; *Jackson* v. *United States*, 129 F. Supp. 537, 540 (D. Utah).

The validity of petitioners' claim is not "conditioned or determined" by the RUIA or by any act of

Congress. Petitioners candidly recognized this fact in their brief to the court of appeals (Appellants' Brief, p. 19):

> The present controversy has arisen only because § 12(o) of the Railroad Unemployment Insurance Act does not address itself to the question in issue. Although this is a matter about which Congress may legislate, the Act neither grants nor denies the right of an attorney recovering funds for the Railroad Retirement Board to reasonable compensation for the benefits he has conferred upon the Board.

To the same effect, see Pet. 10. Admittedly being unable to found their claim upon the provisions of an act of Congress, petitioners rely on what they conceive to be the general "equitable principles usually applicable to a subrogated fund * * *"— "* * * a cardinal rule of equity to impose the burdens of producing a common recovery proportionately upon those who benefit from the recovery" (Pet. 10). As the court of appeals noted, however, 'The minute this argument is made * * * it puts the claim outside the Tucker Act altogether. The claim is then based not upon a statute of the United States, but rather on general equitable principles. There is no basis in the Tucker Act at all for the assertion of these. * * *" (Pet. App. 15).

This conclusion is not affected by petitioners' contention that the Congressional silence in the RUIA on the matter of attorneys' fees raises a question as to whether "equitable principles usually applicable to a subrogated fund" should be applied here and therefore the instant litigation "involves a dispute re-

specting the construction and effect of § 12(o) of the RUIA" (Pet. 9–10). For at most, this is to say that the Congressional silence permits a reference to general equitable principles. Even if this could be said (but see pp. 10–12, *infra*), the fact remains that the claim is then determined by such equitable principles and not by an act of Congress. *Gully* v. *First National Bank, supra.*[2]

Nor is there substance to petitioners' assertion that it is enough for Tucker Act jurisdiction that the government received the payment under color of a federal statute and that the determination of the litigation involves a federal question. In all of the refund cases cited by them (Pet. 6) which involved Tucker Act jurisdiction,[3] the validity or invalidity of the claim on the merits was dependent upon an act of Congress. Thus, they have no application where, as here, there is an explicit and necessary disavowal that the claim is conditioned upon Section 12(o) of the RUIA or any other provision of an act of Congress.

2. There is no greater validity to petitioners' claim on its merits. As petitioners note (Pet. 10), the RUIA does not expressly provide that attorneys' fees may be charged against the money returned to the

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[2] The Court in *Gully* rejected a similar argument advanced in the context of a question whether a particular claim was one "arising under" a law of the United States. There is no difference between claims "arising under" and those "founded upon" a federal law. *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32.

[3] In the cases cited by petitioners at page 8 of their petition, Tucker Act jurisdiction was not involved.

Board in satisfaction of its lien under Section 12 (o) of the RUIA for sickness benefits paid to a railroad employee. Petitioners insist that this Court should draw from the fact that the RUIA does not expressly prohibit such a charge an inference that Congress intended to permit it where sanctioned by equitable principles. Such an inference, however, is not permissible for several reasons.

As the court of appeals noted (Pet. App. 16), where Congress has desired to permit a charge for attorneys' fees against the subrogee's claim, it has expressly so provided. See, e.g., 5 U.S.C. 777 and 33 U.S.C. 933. Particularly in light of the magnitude of the sickness benefit program established by the RUIA,* the absence of such a provision here must be deemed deliberate.

The language of Section 12(o) of the RUIA affirmatively reflects a legislative purpose not to permit a charge for attorneys' fees against the lien created by that section. In pertinent part it provides (emphasis added):

> The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee, * * * on account of any liability * * * based upon such infirmity, *to the extent that it will have paid or will pay benefits*

* As of the end of fiscal year 1958-1959, cumulative sickness and maternity benefits disbursed by the Board equalled $5 billion; as of the same date cumulative Section 12(o) reimbursement totaled $39,294,000. Annual Report, Railroad Retirement Board, 1959, p. 1; Monthly Review, Railroad Retirement Board, for August of the fiscal years 1949 through 1959.

> *for days of sickness resulting from such infirmity.* Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such claim or right * * * and any sum or damages paid under such right or claim, *to the extent of* the amount to which the Board is entitled by way of reimbursement.

Contrary to petitioners' assertion (Pet. 11), there is nothing ambiguous about this language. It means exactly what it says. The words "to the extent of" in the last sentence refer to the "amount to which the Board is entitled by way of reimbursement" and that amount, in turn, is defined by the preceding sentence which provides that the Board is entitled to reimbursement out of the "sum or damages" recovered from the tortfeasor, "to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity." In other words, the Board is entitled to get back what it has paid out in sickness benefits.

Under petitioners' theory, the Board could not recover its payments. For, according to them, in each case in which the Board asserts a lien under Section 12(o) for sickness benefits paid, the employee's attorney could deplete the amount of the Board's reimbursement by asserting a right to a fee out of the lien amount for his efforts in having brought about the 'recovery.' This would be contrary to the express directive of the statute which provides that the Board be reimbursed "from any sum or damages paid * * * to the extent that it will have paid or will pay benefits for days of sickness * * *." Congress

cannot have intended the opposite result urged by petitioners. Cf. *United States* v. *Atlantic Coast Line R.R. Co.*, 237 F. 2d 137, 139 (C.A. 4).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1962.

APPENDIX

COMPLAINT

1. The plaintiffs, B. NATHANIEL RICHTER, JOSEPH S. LORD, III, and ELWOOD S. LEVY, are residents and citizens of Pennsylvania, engaged in the practice of law and are duly licensed under the laws of the Commonwealth of Pennsylvania and are admitted to practice before the Courts of Philadelphia County and various Courts of Pennsylvania and of the United States.

2. The defendant is the UNITED STATES OF AMERICA among whose agencies is the Railroad Retirement Board (hereinafter sometimes referred to as "BOARD") established as an independent board in the executive branch of the government by § 10 of the Railroad Retirement Act of August 29, 1935, 49 Stat. 973, as amended, at 45 U.S.C. 228(j)(a).

3. Jurisdiction is based upon Title 28, United States Code § 1346.

4. On or about October 24, 1956, at Philadelphia, Pennsylvania, Peter J. Urban (hereinafter sometimes referred to as "EMPLOYEE") did sustain injuries while engaged in the course of his employment by the Pennsylvania Railroad Company (hereinafter sometimes referred to as "RAILROAD").

5. On June 25, 1957, plaintiffs, as attorneys for EMPLOYEE did, pursuant to the provisions of the Employers' Liability Act (Act of April 22, 1908, C. 149, 35 *Stat.* 65; 45 U.S.C. 51 *et seq.*, as amended) initiate an action against RAILROAD in the Court of Common Pleas No. 7 of Philadelphia County, as of No. 2605,

June Term, 1957, and during March of 1960 upon settlement of this litigation and claim did effectuate a gross recovery of $16,800.

6. For the purpose of effectuating said recovery plaintiffs were retained as counsel by EMPLOYEE on a contingent fee basis.

7. On or about March 3, 1960, plaintiffs received from RAILROAD voucher No. 10360 in the sum of $14,598.00 made payable to plaintiffs and EMPLOYEE in settlement of the claim of EMPLOYEE against RAILROAD for damages sustained in said accident of October 24, 1956. This voucher specified that the sum of $2,210.00 had been deducted by the RAILROAD from the $16,800.00 otherwise due EMPLOYEE and plaintiffs and paid over to the Railroad Retirement Board in accordance with a lien filed by said BOARD with the RAILROAD for benefits previously paid by the UNITED STATES through the BOARD to EMPLOYEE on account of disability arising from said accident. Said sum of $2,210.00 had in fact been paid by RAILROAD to the UNITED STATES through the BOARD as set forth in said voucher.

8. All services rendered by the plaintiffs in securing the aforesaid recovery and settlement with the RAILROAD for damages arising out of the aforementioned accident of October 24, 1956, were rendered by plaintiffs within the Commonwealth of Pennsylvania.

9. EMPLOYEE paid a contingent fee to plaintiffs in the sum of $4,639.41 for services rendered by plaintiffs to EMPLOYEE in securing for EMPLOYEE the net recovery of $13,918.25. Said net recovery being equal to the gross recovery of $16,800.00 less litigation expenses and costs of $671.75 and also the $2,210.00 paid by RAILROAD directly to the UNITED STATES through the Railroad Retirement Board as set forth in paragraph 7 hereof.

10. In paying over the sum of $2,210.00 to the UNITED STATES through the BOARD, said RAILROAD, in error, failed to deduct the sum of $736.67 from the amount so remitted to the UNITED STATES. This latter sum of $736.67 should have been paid over by RAILROAD to the plaintiffs rather than to the BOARD since it represents moneys due the plaintiffs out of the fund of $2,210.00 in consideration of the services rendered by the plaintiffs to the Railroad Retirement Board and the UNITED STATES in creating said fund by securing for the Railroad Retirement Board and the UNITED STATES said sum of $2,210.00.

11. The reasonable and proper value of the services rendered by the plaintiffs, for the benefit of the UNITED STATES in effectuating the aforementioned recovery from RAILROAD and creating said fund of $2,210.00 and resulting in said sum being paid over by RAILROAD to the UNITED STATES is Seven Hundred Thirty-six Dollars and Sixty-seven Cents ($736.67).

12. On or about March 30, 1960, plaintiffs advised the Railroad Retirement Board of the error of RAILROAD in making the payment of $736.67 to the BOARD rather than to plaintiffs and demanded that said moneys be paid over to the plaintiffs.

13. On or about April 5, 1960, plaintiffs were advised by the Regional Director of the Railroad Retirement Board at New York City that the UNITED STATES would not pay over to plaintiffs the sum of $736.67 as demanded by plaintiffs in the letter of demand referred to in paragraph 12 hereof.

Wherefore, plaintiffs demand from the UNITED STATES the sum of $736.67 together with interest thereon from March 3, 1960.

/s/ MARVIN GARFINKEL,
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Attorney for Plaintiffs.